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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/734,000	12/11/2003	Robert Brown	VW1.P01	9849

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EXAMINER

BELL, KENT L

ART UNIT	PAPER NUMBER
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1661

DATE MAILED: 04/07/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/734,000

Applicant(s)

BROWN, ROBERT

Examiner

Kent L. Bell

Art Unit

1661

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(c) filed on application filed 12/11/03.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 12/11/03 are: a) ☒ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

K. L. Bell

**Detailed Action**

**Priority**

Applicant sets forth on the Bibliographic Data Sheet that this application claims benefit of application number 60/435,131 filed 12/19/2002. The prior application needs to be listed in the Declaration and in the first paragraph of the specification (MPEP 201.11).

**Objection to the Disclosure**

**37 CFR 1.163**

The following is a quotation of section (a) of 37 CFR 1.163:

(a) The specification must contain as full and complete a disclosure as possible of the plant and the characteristics thereof that distinguish the same over related known varieties, and its antecedents, and must particularly point out where and in what manner the variety of plant has been asexually reproduced. In the case of a newly found plant, the specification must particularly point out the location and character of the area where the plant was discovered.

**35 USC § 112**

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

### **Detailed Action**

As specific to United States Plant Patent applications, the specifics of 37 CFR 1.164 (reproduced below) are controlling:

The claim shall be in formal terms to the new and distinct variety of the specified plant as described and illustrated, and may also recite the principal distinguishing characteristics. More than one claim is not permitted.

In plant applications filed under 35 U.S.C. 161, the requirements of 35 U.S.C. 112 are limited. The following is a quotation of 35 U.S.C. 162:

No plant patent shall be declared invalid for noncompliance with section 112 of this title if the description is as complete as is reasonably possible. The claim in the specification shall be in formal terms to the plant shown and described.

The disclosure is objected to under 35 CFR 1.163(a) and under 35 U.S.C. 112, first paragraph, because the specification presents less than a full, clear, and complete botanical description of the plant and the characteristics which define same per se and which distinguish the plant from related known cultivars and antecedents.

More Specifically:

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A. Page 1, lines 6 and 7, Applicant states there are no related applications. However, applicant states on the Bibliographic Data Sheet that the instant application claims benefit of application 60/435,131 filed 12/19/2002. These recitations are contradictory. Correction and/or clarification is necessary.

**Detailed Action**

B. Page 2, lines 6-8, Applicant states scionwood from the original mutated branch was grafted onto two established trees. Applicant should set forth in the specification the name of the two established trees and state whether the two established trees were of the same variety or different.

C. Page 2, lines 8 and 9, Applicant states “fruit from the grafted trees is identical to that of the mutated branch of the original tree...thus establishing the trueness to type of the mutation”. The entire tree must reproduce true to type through successive generations of asexual reproduction not just the fruit. Applicant should verify whether or not the instant tree reproduces true to type through successive generations of asexual reproduction. If such is the case, applicant should state in the specification - -‘Brown’ reproduces true to type through successive generations of asexual reproduction.- -.

D. Page 2, line 10, Applicant should delete “Van Well Nursery,” as this recitation constitutes unwarranted advertising (MPEP 1610). The current recitation without the recitation stated above is more than adequate.

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E. Page 2, line 16, Applicant states “possibly flavor”. Either the instant tree’s fruit is distinct from the parental tree’s fruit or it isn’t. The specification is a place for factual information

**Detailed Action**

not a place for something that may or may not be true or accurate. If the instant tree's fruit flavor is distinct from the parental cultivar then such should be stated in the specification. If the instant tree's fruit flavor is not distinct from the parental cultivar then such should be stated in the specification. Correction and/or clarification is necessary.

F. Page 2, line 16, Applicant states "storage quality is thought to be longer". Either the instant tree's fruit storage quality is longer from the parental tree's fruit or it isn't. The specification is a place for factual information not a place for something that may or may not be true or accurate. If the instant tree's fruit storage quality is longer from the parental cultivar then such should be stated in the specification. If the instant tree's fruit storage quality is not longer from the parental cultivar then such should be stated in the specification. Correction and/or clarification is necessary.

G. Page 3, line 5, Applicant states Fig. 2 illustrates the fruit. However, it is unclear whether the fruit illustrated is for 'Bing' or 'Brown'. Clarification is necessary.

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H. Page 3, line 9, Applicant states " 'BC 13S-2009' ". However, when compared to Figure 5, Applicant states "135-2009". It is uncertain if the two cultivars stated are one and the

**Detailed Action**

same. Correction and/or clarification is necessary. If they are then the specification should state why there is a discrepancy in the names set forth.

I. Page 3, line 14, Applicant states “original” tree. It is unclear whether applicant intends “original” tree to mean the originally grafted tree or something else. Clarification is necessary.

J. Page 3, lines 13-15, Applicant should set forth in the specification the age of the tree when described.

K. Page 3, line 21, Applicant should set forth in the specification the typical and observed tree shape.

L. Page 3, line 22, Applicant states tree size is “Large, identical to ‘Bing’”. Applicant should set forth in the specification the typical and observed mature tree height or height at a specified age. The recitation “Large, identical to ‘Bing’” is vague and insufficient in this regard, especially as applicant has not set forth any meaningful comparative data for the ‘Bing’ cultivar. In addition, applicant should set forth in the specification the typical and observed tree diameter.

**Detailed Action**

M. Page 4, line 1, Applicant states “Vigorous”. Applicant should quantify “vigorous” such as by setting forth in the specification the typical and observed amount of growth per season. The recitation “Vigorous” is vague and insufficient in this regard.

N. Page 4, line 6, Applicant states productivity is “Good, similar to ‘Bing’”. Applicant should set forth in the specification meaningful information relative to the instant tree’s productivity such as the amount of fruit produced per harvest. The recitation “Good, identical to ‘Bing’” is vague and insufficient in this regard, especially as applicant has not set forth any meaningful comparative data for the ‘Bing’ cultivar.

O. Page 4, lines 15 and 16, Applicant should set forth in the specification additional information relative to the instant tree’s branches including the typical and observed branch length.

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P. Page 5, lines 4-21, Applicant should set forth in the specification additional information relative to the instant tree’s leaves including the typical and observed leaf base descriptor.

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**Detailed Action**

Q. Page 5, line 22 to page 6, line 5, Applicant should set forth in the specification additional information relative to the instant tree's flower buds including the typical and observed coloration with reference to the employed color chart.

R. Page 6, line 8, Applicant should set forth in the specification additional information relative to the instant tree's flower including the typical and observed depth.

S. Page 6, line 11, Applicant should set forth in the specification additional information relative to the instant tree's petals including the typical and observed number per flower, shape, length, width, apex, base, and margin descriptors, and coloration (both surfaces) with reference to the employed color chart.

T. Applicant should set forth in the specification information relative to the instant tree's peduncle including the typical and observed peduncle length, diameter, and coloration with reference to the employed color chart.

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**Detailed Action**

U. Page 6, line 15, Applicant should set forth in the specification additional information relative to the instant tree's pedicel including the typical and observed pedicel diameter, and coloration with reference to a recognized color chart.

V. Applicant should set forth in the specification the typical and observed number of pistils per flower.

W. Page 7, line 1, Applicant states "(8-1/2 to 9 row)". This recitation is not understood. Clarification is necessary.

X. Applicant should set forth in the specification additional information relative to the instant tree's fruit including the typical and observed fruit cavity depth, and breadth, and fruit number per cluster.

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Y. Page 7, lines 9 and 10, Applicant should set forth in the specification additional information relative to the instant tree's fruit stem including the typical and observed length, diameter, and coloration with reference to the employed color chart.

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**Detailed Action**

Z. Page 10, The Claim, The Claim should be drawn to the instant tree and typically as “illustrated and described” (MPEP 1605). Applicant should set forth a new claim such as - -A new and distinct variety of Cherry tree named ‘Brown’, as illustrated and described.- -.

AA. Applicant should provide an additional photographic illustration of the entire tree, if readily available. If provided, applicant should describe it in the specification.

The above listing may not be complete. Applicant should carefully review the disclosure and import into same any corrected or additional information which would aid in botanically identifying and/or distinguishing the cultivar for which United States Plant Patent protection is sought.

**Claim Rejection**

**35 U.S.C. 112, 1st & 2nd Paragraphs**

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Claim 1 is rejected under 35 U.S.C. 112, first and second paragraphs as not being supported by a clear and complete botanical description of the plant for the reasons set forth in the Objection to the Disclosure Section above.

**Detailed Action**

**Comments**

Applicant should note the new amendment format which is now mandatory (Web site stated below).

<http://www.uspto.gov/web/offices/pac/dapp/opla/preognotice/revamdtprac.htm>

Applicant should send all correspondence to the following address:

COMMISSIONER FOR PATENTS  
P.O. BOX 1450  
ALEXANDRIA, VA 22313-1450

**Future Correspondence**

Any inquiry concerning this communication or earlier communications from the Examiner should be directed to Kent L. Bell whose telephone number is (571) 272-0973. The Examiner can normally be reached Monday through Thursday from 6:00 am to 4:30 pm.

If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's supervisor, Bruce Campell, can be reached at (571) 272-0974.

The fax phone number for the group is (571) 272-1600.

Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-0196.

K. L. Bell

**KENT BELL  
PRIMARY EXAMINER**

